

CAN OBEYING THE LAW REDUCE THE COST OF STRESS AT THE WORKPLACE?

Presented by

BRENDA BARRETT

Emeritus Professor of Law

Middlesex University Business School

The Burroughs
Hendon,
London NW4 4BT

b.barrett@mdx.ac.uk

Telephone: 44 (2)20 8411 5836

Stress, workplace, sickness, cost, law

ABSTRACT

Stress at the workplace is of great concern to the British Health and Safety enforcement agency. Its (HSE) web site states: ‘up to 5 million people in the UK feel “very” or “extremely” stressed by their work; and work-related stress costs society about £3.7 billion every year (at 1995/6 prices)’.

Research by HSE has led to ‘Management Standards’, published as guidance to employers on assessment of whether their employees are at risk of suffering stress at work. For the past decade employers have been required to undertake risk assessments but the focus has hitherto been on identifying the risk of physical injury being caused by activities at the workplace. The new standards indicate a shift towards imposing responsibility for psychiatric injury, with the implication that employers may be prosecuted for failure to carry out and respond to appropriate assessments.

Over the past decade there has also been a growth in civil litigation by employees seeking compensation for illness which they allege is attributable to stress suffered at work. Appeal courts have provided guidance as to when employers will be liable.

This paper questions whether the HSE and the civil courts are setting the same criteria for employers. It will note the difficulty of identifying when stress experienced by an individual while at work is attributable to work; the desirability of reducing the incidence of stress in the workforce, howsoever caused, and query whether it is cost effective to operate a stress-free workplace.

1 INTRODUCTION

This paper notes the prevalence in Britain of work-related stress and considers the statements emanating from the occupational health and safety enforcement agency (HSE) and the Court of Appeal concerning employers' responsibilities in this context. It compares these statements (albeit not exhaustively) to determine whether they are comparable and concludes by questioning whether complying with them will be likely to reduce stress at the workplace.

Throughout the paper it is assumed that employers (who will normally be corporations) are socially responsible and that they will wish to:

- avoid causing ill-health to their employees;¹
- obey the law; and
- use their resources cost-effectively.

It is acknowledged that corporate social responsibility is arguably concerned with voluntary behaviour and obeying the law should not be discussed in this context, since obedience to the law is not optional. The current writer does not entirely accept this argument; the decision whether or not to obey the law can be the subject of risk assessment. How often does the car driver note both the time and that s/he is exceeding the 30 mph speed limit, calculate whether by reducing speed the car will arrive at the intended destination at the intended time and decide the consequences of being late for the appointment are going to be serious and the likelihood of being stopped for "speeding" is fairly remote? It is however assumed here that employers will not make a risk assessment about the legal implications of ignoring the law on stress at the work place.

2 RECOGNISING THE PROBLEM OF WORK-RELATED STRESS

Stress is acknowledged as a very significant cause of work-related ill-health in Britain in the twenty-first century. It is possibly the major cause of health related absences from work. It is therefore very costly to employers in terms of loss of productivity. For these purposes a generally accepted definition of stress is: "the adverse reaction people have to excessive pressure or other types of demand placed on them". This is the definition adopted by HSE.²

Stress can cause either physical or psychiatric illness. The problem for consideration here is mental stress, but that may cause physical illness. Repetitive strain injury, which was the subject of a considerable amount of litigation a few years ago, particularly among keyboard operators, is a physical manifestation of stress. However it has been suggested that RSI need not be due to repetitive physical activity but may be caused by a mental attitude to the work in question.³ It was officially acknowledged a decade ago that mental stress may manifest itself in physical disorders such as high blood pressure, heart disease, thyroid disorders, ulcers, rather than the symptoms more usually associated with mental stress such as depression and anxiety.⁴

¹ It is understood that socially responsible corporations will wish to avoid causing anyone ill-health, but the statements considered here are both concerned with protection of employees.

² See HSE website: <http://www.hse.gov.uk>

³ See *Mughal v Reuters Ltd* [1993] IRLR 571

⁴ HSE (1995) *Stress at Work A guide for employers* C100

The problem of identifying the incidence of stress at work is that stress is subjective rather than objective: a situation that one person regards as an exciting challenge may be experienced (or at least viewed) by another person as unbearably stressful.

The available statistics on the incidence of stress at work rely heavily on the recorded opinions of those who consider themselves the victims of stress. Thus published statistics may not be entirely reliable. At the time of writing HSE stated on its web site:

- about half a million people in the UK experience work-related stress at a level they believe is making them ill;
- up to 5 million people in the UK feel “very” or “extremely” stressed by their work; and
- work-related stress costs society about £3.7 billion every year (at 1995/6 prices).

A Labour Force Survey, released on 26 May 2005, entitled *Self-reported work-related illness in 2003/04* provides more recent, but broadly similar statistics.⁵ In fact this report emphasises that the annual statistics remain fairly constant.

A report published on 16th May 2005 by Mind⁶ paints an even worse picture. It asserts that stress costs 10% of the UK’s Gross National Product, 12.8 million working days a year are lost to it and 58% of workers complain of job stress, yet fewer than 10 per cent of companies have an official policy to tackle it.

A further difficulty with relying on such statistics is that they take no account of whether those who suffered stress while at work arrived at the work place in a robust condition or whether when they arrived at work they were already rendered fragile by other events in their lives such as domestic or financial problems or difficulties experienced while travelling to work.

While it is not clear that work-related stress is any more prevalent than in earlier times it is clear that there is a greater awareness of the problem and less willingness to tolerate it.

It is not surprising either that the reduction of stress at work has become a top priority for the HSE or that there has been a great increase in civil litigation by victims seeking to obtain damages from their employers. The HSE has issued guidance to employers, initially in a publication *Tackling work-related stress A manager’s guide to improving and maintaining employee health and well being*⁷; more recently by publishing *Tackling stress; The Management Standards*

⁵ Jones, JR, Huxtable CS, and Hodgson, JT, available on the internet at www.hse.gov.uk/statistics/causdis/swi304.pdf

⁶ *Stress and Mental Health in the workplace*

⁷ (2001) HSG218. This is a considerable update on HSE’s original 1995 publication *Stress at work A guide for employers* HS(G)116

approach.⁸ The purpose of these publications is to enable employers to identify symptoms of stress in their work forces, and they indicate appropriate steps that may be taken to prevent or at least reduce the occurrence of unacceptable levels of stress at work. At the same time the Court of Appeal has, in *Sutherland v Hatton* [2002] EWCA Civ 76, laid down propositions as to the circumstances in which courts should find employers liable in negligence for stress caused by work.

The intention of the HSE is to prevent the occurrence of stress and indirectly warn employers that if they do not prevent it as far as is reasonably practicable they may be criminally liable. The purpose of the Court of Appeal was to indicate circumstances in which an employer may have to compensate an employee who has suffered stress related ill health. However the court's propositions could be guidance to employers as to how to identify the potential for stress-related illness in their employees and take remedial action in order to avoid liability.

The intention here is to compare these statements about injury prevention and injury compensation and identify the extent to which the inspectorate operating in the criminal law system is sending out the same message as the judges hearing civil claims.

3 THE INSPECTORATE'S GUIDELINES

First of all it may be helpful to explain the context of the inspectorate's *Management Standards*. The HSE has responsibility for the enforcement of the Health and Safety at Work Act 1974 and other 'relevant statutory provisions'⁹ Enforcement of this legislation is in the criminal courts. There is no relevant statutory provision expressly dealing with stress. The employer's general duty in s.2 of the 1974 Act requires it to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". The general duties under this Act are understood to be absolute duties¹⁰ subject only to s.40 which places the burden on the accused¹¹ to show that it was not reasonably practicable to have done more than it had done to achieve safety. In relation to stress the general duties have to be put in the context of Regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1999 (SI No. 1999/3242) which require every employer to carry out and act on a risk assessment to identify and take the measures necessary to achieve compliance with the relevant statutory provisions. HSE has expressly stated that the risk of stress-related ill-health should be considered when carrying out the assessments required by the Regulations.¹² It is noteworthy, however, that there is no published case of a prosecution having been brought as yet against an employer for operating a stressful work place.

In addition to enforcing the law, the remit of HSE, and its parent body the Health and Safety Commission (HSC), includes providing guidance on the legislation. Such guidance is intended merely to be helpful to those operating under the law. It

⁸ Available on HSE web site

⁹ 'Relevant statutory provisions' is the expression used in the 1974 Act and there stated broadly to mean the relevant parts of the Act itself and regulations made under it (s.53)

¹⁰ E.g. *Austin Rover Group v HM Inspector of Factories* [1989] 2 All ER 1087

¹¹ That this "reverse" burden of proof is not contrary to Human Rights was confirmed in *Davies v HSE* [2002] EWCA Crim 2949

¹² *Tackling Work-related Stress (supra)* at p.3, para 12

has no standing in a court; but in practice it gives employers valuable indications of what the enforcement agency will expect. The exact status of the Management Standards on stress is not entirely clear but it is certainly not higher than guidance.¹³ The publication has printed on it the caveat: “This leaflet contains notes on good practice which are not compulsory but which you may find helpful in considering what you need to do.”

It is not practicable to reproduce the whole of the Management Standards publication here, but in summary HSE says the standards “define the characteristics, or culture of an organisation where stress is being managed effectively.” They cover “six key areas of work design that, if not properly managed are associated with poor health and well-being, lower productivity and increased sickness absence.” These factors are:

DEMANDS – workload, work patterns, and the work environment

CONTROL – how much say the person has in the way they do their work

SUPPORT – the encouragement, sponsorship and resources provided by the organisation, line management and colleagues

RELATIONSHIPS – promoting positive working to avoid conflict and dealing with unacceptable behaviour

ROLE - whether people understand their role within the organisation and whether the organisation ensures that the person does not have conflicting roles

CHANGE – how organisational change is managed and communicated in the organisation

In each case the standard is:

- Employees indicate that the situation is satisfactory¹⁴
- Systems are in place locally to respond to any individual concerns

The statement of what should be happening to achieve the requisite standards varies considerably from factor to factor but some emphasis is placed on selection, information, training and consultation. HSE’s general aim is that employers work with employees to introduce a process of continuous improvement.

4 WHAT THE CIVIL COURTS EXPECT

Traditionally employer’s liability to pay damages for causing personal injury to an employee has been determined by the civil courts in litigation based on the tort of negligence. Up till the 1990s litigation was only about *physical* injury but from about 1995 onwards claims have been made for *psychiatric* injury resulting from

¹³ The Standards are not described as guidance but as guidelines.

¹⁴ This is a paraphrase: the wording is slightly different for each factor. E.g. In respect of demands employees indicate “they are able to cope”; in respect of control they indicate “they are able to have a say ...”.

stress. It was accepted in *Walker v Northumberland CC*¹⁵ that the duty of care owed by an employer to its employee did extend to cases of psychiatric injury. Thereafter many claims were set down for hearing and a number were actually heard, till in *Sutherland v Hatton*¹⁶ Hale LJ, sitting in the Court of Appeal laid out propositions for the guidance of judges trying such cases. These propositions were implicitly accepted by the House of Lords in *Somerset County Council v Barber*.¹⁷ It is noteworthy that these propositions appear to make it harder for employees to litigate successfully in the tort of negligence and there have since been attempts to litigate by different routes¹⁸ but suing under the tort of negligence remains the mainstream way of claiming and the *Sutherland* case provides the only clear statement of the parameters of employer's liability to pay damages to employee victims of work-related stress.

In order to understand the propositions in *Sutherland* it must be borne in mind that to succeed in an action in negligence the claimant has to show the defendant owed a duty of care; broke that duty by negligent conduct and thus caused the claimant to suffer damage. Hale LJ's 16 propositions addressed all these aspects of the tort but all that is relevant here is what she said concerning the employer's conduct. The following statements are taken from her summary in paragraph 43 of the law report.

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable...

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. ...

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared

¹⁵ [1995] IRLR 35

¹⁶ *Supra*

¹⁷ [2004] UKHL 13. The *Sutherland* case dealt with a number of appeals from county courts and Mr Barber's case was one of them. The Court of Appeal found he was not entitled to damages (as indeed it did with most of the other claimants!) and Mr Barber appealed to the House of Lords. Their Lordships restored the county court decision in his favour, focussing on the facts of the case, so only Lord Scott had said (para 5) that Hale LJ successfully and accurately expressed the propositions that ought to be applied. While no other Law Lord expressly affirmed them none appeared to dispute them

¹⁸ E.g. The joined appeals of *Eastwood* and *McCabe* [2004] UKHL 35 established it may be possible sometimes to sue in contract for breach of the implied duty of trust and confidence; *Dunnachie* [2004] UKHL 36, established employment tribunals cannot make awards for psychiatric injury when hearing unfair dismissal cases; *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 482 seems to suggest Employment Tribunals may however make such awards in discrimination cases; *Majrowski v Guy's & St Thomas's NHS Trust* [2005] EWCA Civ 251 has opened the door to claims being made under the Protection from Harassment Act 1997.

with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work ...

(6) The employer is generally entitled to take what he is told by his employee at face value ...

(7) ... the indications of impending harm to health ... must be plain enough for any reasonable employer to realise that he should do something about it

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly ...

(10) An employer can only reasonably be expected to take steps which are likely to do some good ...

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.

5 ARE THE STANDARDS THE SAME?

It is rather difficult to compare the HSE Standards with Hale LJ's propositions because it is necessary to look for similarities and differences in the underlying concepts rather than directly compare the statements. In attempting this task it can be noted:

1. Both the HSE Management Standards and the employer's liability to compensate victims of stress at work are concerned only with the safety of employees. They do not address the safety of other categories of workers, such as agency workers who may not have a contract of employment at all. In such employment arrangements the agency will often expressly say the worker is not its employee and the organisation where the worker spends

his working life has no express contractual relationship with the worker so unless the courts are prepared to find an implied contract of employment between the worker and the organisation where the task is performed the worker does not have the status of employee¹⁹. However, interestingly, the Labour Force Survey found “that the prevalence rate of stress, depression or anxiety amongst employees was statistically significantly higher than the rate amongst the self-employed.”²⁰ This possibly reflects that thriving on challenge is typically a character trait of a self-employed person.

2. The purpose of the HSE Management Standards is to remove the risk of harmful stress. The Standards therefore reflect that it is concerned that the employer should have a system of work in which all employees are safe, though it does require the employer has systems to respond to individual concerns. Compensation law requires the employer to have regard to the safety of the individual worker, taking into account any particular known vulnerability of the individual.²¹ Nevertheless Hale’s propositions do note that any solution for the particular employee must not impact unfavourably on other members of the work force.
3. Both systems appear to place reliance on the vulnerable employee telling the employer of any problems. Case law suggests that the employee at risk may well be a conscientious worker who is not the type to seek relief from an excessive workload.²² Nevertheless Hale LJ says that the employer is entitled to rely on what the employee says, though she does say that the employer may be put on notice by the behaviour of the worker.
4. The burden of proof is different in the two systems of law. In the criminal law the employer is liable once an unsafe system is established by the evidence unless the employer can satisfy the court that it was not reasonably practical for it to remove or reduce the risk. In the civil law it is not sufficient for the victim to show that the situation caused personal injury: s/he must show that the situation was due to the employer’s negligent conduct.
5. The duty in the civil law of negligence is to take reasonable care; the duty under the 1974 Act is an absolute one, subject only to the defence of reasonable practicability. The relatively low standard of the duty in the tort of negligence is one of the principal reasons claimants are experimenting with other forms of litigation.²³

¹⁹ In *Dacas v Brook Street Bureau (UK) Ltd* [2004] ECWA Civ 217 the Court of Appeal suggested there might be an implied contract of employment but the nature of the appeal did not enable it to determine this.

²⁰ *Self-reported work-related illness in 2003/04* at p.322.

²¹ *Paris v Stepney BC* [1951] AC 367 – provide safety goggles for a one-eyed employee

²² *E.g. Walker V Northumberland CC* [1995] IRLR 35; *Post Office v Jones* [2001] EWCA 558

²³ A recent case has decided that the Protection from Harassment Act 1997 may be invoked to attach liability to the employer for harassment by an employee, provided that harassment is sufficiently related to the wrongdoer’s employment. *Majrowski v Guy’s and St Thomas’s NHS Trust* [2005] EWCA Civ 251

6. An employer's liability to compensate depends on the illness being foreseeable.²⁴ While this appears to be unfavourable to the claimant, with the introduction of the HSE guidelines a claimant could plead that if a proper risk assessment had been conducted the injury would have been foreseeable. In employment tribunals it has already been accepted that failure to carry out a proper risk assessment may constitute constructive dismissal.²⁵
7. Liability does not normally arise in compensation law unless a claimant has suffered ill-health and can prove that the ill-health was caused by the employer's negligence in respect to the employment.²⁶ The objective of the guidelines is to prevent injury and the law permits prosecution of a person who creates an unlawful risk even if no-one is actually injured.
8. Both sets of standards recognise that much depends on the character of the individual. While by inference the HSE standards are concerned primarily with the general climate of the workplace they provide for catering for the needs of the particular individual.
9. Both sets of standards recognise the value of dialogue between employer and employee. The HSE standards emphasise consultation with the group as well as catering for the individual, and it is appropriate that they should do so since there are regulations imposing duties on an employer to consult with its employees on health and safety matters whether or not the work place is unionised.²⁷ The civil law stresses the value of a referral service from which an individual may obtain support.
10. The HSE guidelines make no reference to different expectations of an employer with limited resources: the civil law expressly considers the size of the employer's operation as relevant to what can be expected of the employer. There is, though, some lack of clarity in the civil law in this respect because in *Walker v Northumberland CC* the High Court considered the employer's limited resources was no excuse for its failure to alleviate the workload of an employee who had already suffered one stress-related illness. However in *Walker* the defendant was a county council not an SME!

²⁴ Foreseeability is a peculiarity of the tort of negligence: this partly explains why recently claimants have sought alternate remedies. See footnote 14

²⁵ *Bunning v Bunning* [2005] EWCA Civ 104; but in the ET, following the House of Lords decision in *Dunnachie* (supra) a claimant could not claim damages for stress illness.

²⁶ An attraction of the new development of relying on the Protection from Harassment Act is that it allows compensation for "anxiety"

²⁷ There are two separate sets of Regulations one for unionised work places, Safety Representatives and Safety Committees Regulations 1977 (SI 1997 No.500) and the other primarily for non-unionised work places, Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996 No.1513). In the earlier regulations it is left to the recognised TU to request a system for communication; under the later set the obligation is on the employer to consult, but it may elect to do so personally to individual employees. With the decline in unionisation it is not clear that either set of regulations is honoured.

11. Historically cost benefit was regarded as the criterion of what is “reasonably practicable” when dealing with claims for compensation for personal injury caused by breach of a statutory duty,²⁸ but it has never been judicially confirmed that the same test applies in relation to the meaning of these words in the criminal courts under the 1974 Act. It is arguable that a cost benefit approach fits ill with the idea of absolute duties with only a limited defence
12. Hale LJ took the view that an employer had no obligation to dismiss an employee who appreciated the risk he was taking but nevertheless wished to continue in the employment. It is unlikely that the criminal law would take the same view. The Employment Rights Act 1996 s.98(2)(d) provides that an employer may fairly dismiss an employee if the “employee could not continue to work in the position which he held without contravention (either on his part or that of his employer), of a duty or restriction imposed by or under an enactment”. It is an interesting question whether if a risk assessment indicated an employee would be at risk of stress-related illness if s/he continued in that employment it would be fair for the employer to dismiss that employee, always provided that it was not possible for the employer to offer alternative employment acceptable to the employee
13. The civil law makes no express reference to the factors, such as control, and relationships, that are central to the guidelines, though arguably the reference to the value of a referral service does amount to a particular instance of support
14. The HSE guidelines place some emphasis on matching the person to the job in terms of individual skills and abilities. The civil law starts from the point of what is normal for the job, though it does include reference to the relationship between the job and the particular employee.

6 SUMMARY OF COMPARISON

This comparison between the expectations of the inspectorate and those of the judiciary suggest that the criminal law, which is essentially concerned with risk assessment and response, is setting higher standards for the employer than is the civil law setting out the circumstances in which an employer may be liable to compensate. In practice however, up to the present time the employer has undoubtedly been at greater risk of being taken to court by an employee seeking compensation than by an inspector initiating a prosecution. This is only in part because compensation law has a longer history. As far as occupational health and safety is concerned, inspections occur relatively infrequently and prosecution is not the only tool available to an inspector who is dissatisfied with the situation at a workplace. The inspector is likely to advise and recommend and if this fails an improvement notice may be served requiring the employer to rectify the problem identified. Prosecutions, particularly if there has not been an injury, are relatively rare. In addition stress may well be due to physical conditions at the work place, for example overcrowding, excessive noise, or psychological factors such as fear

²⁸ *Edwards v National Coal Board* [1949] 1 KB 704

of physical violence. In such a situation where the cause of the stress is identifiable the inspector may well address the cause rather than the stress itself.

7 WILL OBEYING THE LAW REDUCE THE INCIDENCE OF STRESS?

To identify the factors causing stress the HSE has undertaken a considerable amount of research over the past decade, but the circumstances in which people become ill are at least as well demonstrated by looking at the facts of the cases that have been litigated. The majority of the cases have concerned public sector employees. One explanation of this may be that the public sector is better unionised than the private and so individuals working in this sector have received support and encouragement in litigation. Another explanation may be that the joint pressures of a climate of accountability and the need for organisations to perform to ever higher standards within a regime of reducing resources are felt intensely by those operating at the “coal face” in the public sector while senior management deliberate on, and experiment with revising systems to meet the new circumstances.

It seems incredible today that it in the 1980s employees of the Inland Revenue refused to use computers.²⁹ In hearing the case the judge held that “an employee is expected to adapt himself to new methods and techniques introduced in the course of his employment” subject only to an obligation on the part of the employer to offer retraining where “esoteric skills” were involved which it would not otherwise be reasonable to expect the employee to acquire. In the two decades since this case was heard it has certainly become recognised that life long learning is necessary in order to cope with the demands of the work place. But while the law now recognises the need for employers to provide training employers introducing new work practices may not always recognise the training needs they create and the difficulties employees may experience in accepting new systems of work.

The pressures created by change are likely to be felt particularly by long service employees in their 50s. It was noticeable in a recent appeal case concerning stress related illnesses suffered by six employees in six different organisations most of the claimants fell into this category and considered themselves overworked while at the same time being resistant to change.³⁰ The Labour Force Survey found that the highest prevalence rates of work-related stress was in the 45-54 year age group but this leaves open whether this is due to physiological or work-related causes.³¹

The claimants in many of the cases litigated in the civil courts are employees who have found adaptation to change to be unacceptably stressful. Yet change is the norm at the work place today. It is needed both to enable new technology and to comply with an ever increasing number of regulatory requirements. The combined effect of these factors may well leave the employee with a sense of having to meet

²⁹ *Cresswell v Board of Inland Revenue* [1984] IRLR 190.

³⁰ (1) *Hartman v South Essex Mental Health and Community Care NHS Trust*; (2) *Best v Staffordshire University*; (3) *Wheeldon v HSBC Bank Ltd*; (4) *Green v Grimsby & Scunthorpe Newspapers Ltd*; (5) *Moore v Welwyn Components Ltd*; (6) *Melville v The Home Office* [2005] EWCA Civ 06

³¹ *Self-reported work-related illness in 2003/04* at p.316. Men in the 35-44 age group were also found to be vulnerable.

excessive demands, while having no control over his/her work and being expected to undertake new roles.

The claimants in stress cases are frequently very conscientious employees who resist systems that in their view will result in work of a lower standard. Such people have hitherto proved unlikely to succeed in claims for compensation and they will certainly set a challenge for employers who identify their vulnerability when carrying out the risk assessment that the law now requires. If the employer has the resources to offer re-deployment it is unlikely to be acceptable and termination of the employment of a person who has hitherto given satisfactory employment over a long period of time is not easily achieved without incurring large legal costs. The employer, particularly the small organisation, may find itself on the horns of a dilemma: leave the vulnerable employee in post and risk criminal and/or civil liability or dismiss the employee and have to face a claim for unfair dismissal, which, even if the applicant is unsuccessful is likely to be very expensive for the employer.

8 CONCLUSIONS

A short paper of this description cannot hope to resolve a problem that has taxed both the inspectorate and the judges for at least a decade. All that it can hope to do is point up some of the issues and give cause for thought.

It is suggested that stress at work is experienced by the vulnerable and employees may be vulnerable as a result of a number of factors. The Management Standards propagated by the health and safety inspectorate and the propositions set out by the Court of Appeal are both directed to the identification of working conditions that are objectively likely to cause stress in employees generally. Both sets of guidelines recognise the need to identify and deal with the person who is vulnerable by disposition or personal circumstances. Both systems place some responsibility on the employer to identify such vulnerable people and take steps to assist them by training, support or redeployment. Perhaps the combination of the guidelines and Hale LJ's propositions may encourage employers to have policies with procedures for identifying and dealing with stressful situations at the work place.

Up to a point it is likely to make good commercial sense as well as being socially responsible for an employer to try to retain an experienced employee, by training or re-deployment, but there may well be a point at which on a cost benefit analysis continuing such employment is neither in the interests of the individual worker nor a responsible use of corporate resources.

Questions can then be asked whether the State has the balance right between making it extremely difficult for an employer to dismiss an employee and providing adequate support for and assistance to those who need re-employment in another occupation.

On the release of its report Mind's Chief Executive said:

For us all, there is a responsibility to tackle the widespread stigma concerning mental health, led by the Government. With mental health

problems now accounting for the highest number of Incapacity Benefit claims, we also look to the Government to develop an effective system to support those with mental health problems returning to work – the current Pathways to Work pilot raises grave concerns in this area.³²

In June 2000 the HSE set itself a target to reduce the incidence of work-related ill health by 20% by 2010.³³ Given that stress is one of the, if not the most common cause of work-related ill-health³⁴ this target will be difficult to meet. To achieve this target it will be necessary to tackle not only working life but also the other factors such as the temperament, life style and life demands of individuals which make them fragile and therefore vulnerable to stress at work. Employers may be able to do much more than at present to identify and assist vulnerable employees. The guidelines and propositions considered here may help them in this task, but there will inevitably come a point at which people and organisations outside the workplace have to accept more responsibility than at present if the incidence of stress related illness is to be significantly reduced.

³² Mind website: <http://www.mind.org.uk>

³³ *Revitalising Health and Safety Strategy Statement*. Published by the department of the Environment, Transport and the regions. Produce code OSCSG0390

³⁴ The Labour Force Survey found musculoskeletal disorders as the most commonly reported type of work related illness and stress as the second most common, with estimates of 1.1 million and 0.6 million people reporting a current or past illness.

